was advanced. They did not execute the guarantee. The signatures thereon were not theirs. The Senior Assistant Registrar allowed the application but her decision was reversed by the High Court which gave conditional leave to defend. The condition imposed was for the payment of the sum of $125,000 into the court on or before a certain date and the defence was ordered to be filed within 2 weeks.

We pause here to suggest the great desirability where the court gives leave to defend conditional on the payment into court of a sum of money, of making a further order that upon failure to comply with the condition, the plaintiff applicant will be at liberty to sign final judgment. This further order will avoid the necessity for the plaintiff having to come to court again to sign judgment for non-fulfillment of the condition upon which leave was given.

From the decision of the High Court, both the guarantors and the Bank appeal to this court.

It is clear that the learned judge allowed the appeal in part because from the documents which were documents executed in the ordinary course of business there are even to an untutored eye great variations in the signatures of the appellants and his doubt as to the genuineness of the appellant's signatures on the letter of guarantee was not resolved by the failure of the Bank official before whom the guarantee was executed to come forward to say that the guarantors personally appeared before him and in his presence did sign the document in question. His decision therefore to give leave to defend was, with respect, a rightful exercise of his discretion. In arriving at his decision, he was clearly acting under the powers conferred on him by section 73 of the Evidence Act, 1950 and well might he do so when all he had to do in the application before him was to consider whether the point raised was sufficient to amount to a triable issue. But it was also very obvious in the specimens of their signatures provided by the appellants themselves in the documents signed by them which had nothing to do with the Bank, there are equally great variations. In these circumstances we consider that the learned judge had sufficient and cogent reasons to doubt the genuineness of the defence and his decision to give conditional leave to defend was with respect the right one.

One salient fact that emerged at the hearing. It was before the lower court but no point was taken on it. The overdraft had been secured by a legal charge on a piece of property by M/s. Ho Wai Seng Bhd. This charge constituted therefore the first and real security for the repayment of the loan and was a readily realisable security. The maximum limit of the security provided in the charge was $280,000, which would mean that in the opinion of the Bank the property was worth considerably more. In the time that had elapsed since the execution of the charge, properties in and around Kuala Lumpur have appreciated greatly in value — a fact so notorious that in our view courts can take judicial notice of it. The amount outstanding on the overdraft was only $251,091.64. *Prima facie*, therefore, the realisation of the charge would more than repay the overdraft. In these circumstances the appellants contended that "in law and equity" they should only be called on to meet their guarantee if there should be any deficit after the sum to be realised from the sale of the charged property had been determined.

This contention is not without attraction. We have not heard any substantial submissions at length on this point which was not ruled on in the court below, but while it is uncertain that the claim against the appellants in the circumstances of a charge is bad "in law and equity", it is, in our view, clear that in such circumstances an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors into the Bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of the courts. Where the plaintiff had no substantial interest in the subject of the litigation, had suffered no damage which could not easily be rectified and the action was a useless piece of litigation, the court dismissed it: see *Webster* v. *Bakewell R.D.C. (No. 2).*[1] That was a case where the facts were present at the issue of the writ. The present case may not be so but may well turn out to be effectively a case of, to echo the words used, a useless piece of litigation, so that a court may very well in the exercise of its discretion stay, not dismiss, the action until after the completion of the sale of the property that had been charged to the Bank. A stay (or even dismissal) of proceedings may "often be required by the very essence of the justice to be done", *per* Lord Blackburn in *Metropolitan Bank* v. *Pooley,*[2] so as to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. See also *Riches* v. *Director of Public Prosecutions*[3] *per* Lawton L.J. at pages 1027 and 942 of the respective reports in [1973] 1 W.L.R. 1019 and [1973] 2 All E.R. 935.

We however consider that the application for a stay should, if thought one with reasonable prospects of success, be made in the first place to the court before whom the action is brought.

But for the above reasons we allowed the appeal with costs and granted the appellants unconditional leave to defend. Defence to be delivered within 2 weeks. The cross-appeal was dismissed with costs.

Appeal allowed.

Solicitors: *Chooi & Co.; Suhaimi Khor Zulkifli & Chang.*

K. MURUGESU v. MICHAEL CHONG NGIAN FONG K. MURUGESU v. REGISTRAR OF TITLES & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 13 & 31, 1980]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 69 & 154 of 1979]

Practice and Procedure — Execution of judgment — Prohibitory order — Sale of land — Proceeds retained towards judgment.

Land Law — Private caveats — Caveats extended until further order — Caveats withdrawn at instance of caveators — Registration of transfer valid — National Land Code, ss. 325 and 327.

In this case the facts were that the appellant owned a number of houses. He entered into various agreements to sell the houses to individuals but owing to the delay in completion, the purchasers brought actions for specific performance and lodged caveats against the properties. The appellant applied to remove the caveats but his application was refused and orders were made to extend the caveats until further order. Subsequently the appellant sold the properties to the respondent, Michael Chong. Michael Chong entered into arrangements with the prior purchasers under which he satisfied their claims and they withdrew the caveats. The appellants brought an action in respect of the agreement of sale against Michael Chong claiming a large sum said to be due under the agreement. Michael Chong counterclaimed for the rents received by the appellant from tenants of the houses which he had sold to Michael Chong. The High Court dismissed the appellant's claim and allowed the counterclaim and an appeal to the Federal Court was dismissed — see [1978] 1 M.L.J. 23. Michael Chong then took out a writ of execution and sought to attach certain lands belonging to the appellant. A prohibitory order was registered against the lands. The lands were subsequently sold and it was ordered that the sums realised be retained towards the judgment, interest and costs. The appellant appealed against this order. The appellant also appealed against the order confirming the action of the Registrar of Titles who registered the transfer of the land under the original agreement to Michael Chong.

Held, dismissing the appeals: (1) the order for sale and the order for disposal of the proceeds of sale were valid;

(2) as the private caveats had been withdrawn at the instance of the caveators, the Registrar of Titles was justified in registering the transfer.

FEDERAL COURT.

S.K. Lingam for the appellant.

N. Ramachandran for Michael Chong.

Razali bin Hassan (Federal Counsel) for Registrar of Titles.

Jean Oliveiro for Bank Bumiputra (M) Bhd.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): We heard these two appeals together since they were so intimately related that to do so would occasion an attractive economy of effort.

Civil Appeal No. 69/78 is an appeal from the decision of the High Court in a writ of execution consequent on the outcome of Civil Suit No. 73 of 1970. In that suit, the appellant claimed in respect of an agreement of sale by him to the defendant Michael Chong a fairly large sum of money said to be still due under the agreement. The defendant counterclaimed for a smaller but still considerable sum of money as money received by the appellant from the tenants of the houses which he had sold to Michael Chong but from whom he still collected rents. The appellant's action was dismissed with costs and the counterclaim allowed similarly with costs. The appellant then appealed to the Federal Court where he again lost. He did not take the matter further. The judgment of the High Court became therefore a judgment from which for him there was no turning back unless he could in a new action seek to set it aside for fraud etc. This action he did not at any time take. He did not appear to have any grounds for it.

Michael Chong then took out a writ of execution for the judgment sum in his counterclaim. He sought to attach certain other properties belonging to the appellant. There were 10 parcels of land and providentially he registered a prohibitory order against them. The prohibitory order was due to expire on April 2, 1978 but before this date, the application for sale came up before the judge who did not think that the appellant's plea for an adjournment until the determination of an Originating Motion No. 112 of 1970 taken out by him had any relevance as it was not one in which at that time the execution creditor was a party. The judge accordingly made the order of sale on February 6, 1978. An application under Order 54A rule 22 Rules of the High Court 1957 was met by a decision of the judge not to require further argument and to confirm the order made. A sum somewhat in excess of the judgment sum in the counterclaim was realised from the resultant sale and Michael Chong promptly asked the court to be allowed to retain this sum towards the judgment, interest and costs. The High Court made the order asked for on April 10, 1978. This order was recalled by the judge but on April 17, 1978, he made a similar order as well as confirming the acution sale. Again the court declined further argument.

From the order of April 17, 1978 the appellant appeals to this court.

His first ground of appeal is that the order of April 17, 1978 could not be made when there was no application before the court, and, here we quote "relying on an application based on Summons in Chambers dated 3rd day of March 1978 when such an order was not even prayed for." His counsel could not direct our attention to any such summons in chambers or if 1979 was a typing error for 1978 (which he never thought it was) to any summons dated March 3, 1978. His second ground was that the Order could not be made when there was neither a prohibitory order nor a writ of seizure and sale. This ground completely ignores the facts that the Order of April 17, 1978 was consequent on an Order of Sale made previously on a Writ of Seizure and Sale before the expiry of the prohibition and the purpose was to confirm the sale of the attached properties to the successful bidder at the auction after the lapse of 1 month from the auction and when no objection had been lodged. This ground of appeal had no bearing on the issue. The third and last was even less substantial. It complained of material errors in the proclamation of sale. What errors they were were never specified nor their relevance shown. It was never contended that what was sold was what was not seized.

The grounds of appeal did not refer to the objection which the appellant took on the refusal of the judge to delay hearing until the final disposal of the Originating Motion No. 112 of 1970. In its first form the motion was against the Commissioner of Lands and Mines; it was then amended to substitute the Registrar of Titles and eight full years later, again amended to include Michael Chong and Bank Bumiputra, to whom Michael Chong had charged the lands after they had been transferred to him following the decision of the court in Civil Suit No. 73 of 1970. At this stage a brief narration of the events that led up to this sorry mess will clarify matters considerably.

The appellant owned quite a number of houses. He entered into various agreements to sell these houses to individuals, but he dragged his feet to such an extent that these intending purchasers were driven to

take action in court for specific performance. As well as taking out the writs, these purchasers, as they were perfectly entitled to do and should for their own protection do, lodged private caveats against these properties to prevent the appellant from dealing with them in a way as to effect their interests therein.

By section 327 National Land Code, any person aggrieved by the existence of a private caveat may apply to the court for an order for its removal. The appellant exercised his right to apply, but on his application, the court in each case having regard to the circumstances of the case made an order extending the caveat until further order. This order was registered against the title.

Subsequently the appellant sold the same properties to Michael Chong. This purchaser quickly realised the existence of these prior agreements of sale. His solution to the problem facing him was to come to an arrangement with the prior purchasers under which he satisfied their claims or expectations to such an extent that they withdrew the private caveats lodged by them and discontinued their actions against the appellant.

Section 325 National Land Code provides that a private caveat may be withdrawn at any time by a notice in writing given to the Registrar by the person or body at whose instance it was entered. The prior purchasers acted under this section and it appearing to the Registrar that their notices were perfectly valid, he removed the private caveats.

Next, the Registrar registered transfers of these properties from the appellant to Michael Chong. In this Originating Motion, the appellant therefore sought to set aside the transfers.

In the appeal against the action of the Registrar of Titles, the appellant first contended that the registration of the transfers to Michael Chong was wrong in view of the existence of the private caveats. When it was pointed out to him that the private caveats had been removed, he came up with a contention that the withdrawal of the private caveats was wrong and in disobedience, if not in contempt, of the court which had ordered the continuation of the caveats until further order and of this order there had been none.

Having ascertained from the Registrar of Titles who appeared by Federal Counsel that the withdrawal of the private caveats was at the instance of the caveators, we dismissed the appeal against the order confirming the action of the Registrar. We saw no reason why the order of the court which was made necessary by the application of the appellant should operate to prevent the caveators from withdrawing their caveats themselves without this further order of the court. There could be no doubt that if it had been necessary for the caveators to apply to court, the court would not have the slightest hesitation in ordering the withdrawal.

The appellants shall pay the costs of both appeals to all the respondents.

Appeals dismissed.

Solicitors: *S.K. Lingam & Co.; N. Ramachandran & Co.; Lee Boon Peng & Co.*

INTERNATIONAL TIMES & ORS. v. LEONG HO YUEN

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho. J.) September 5, 1979 & February 28, 1980]

[Kuching — Federal Court Civil Appeal No. 128 of 1979]

Tort — Libel — Defamatory publication — Defence of justification and fair comment — Onus of proof — Whether onus of proof has shifted — Presumption of falsehood.

Evidence — Onus of proof — Evidence Act, 1950, ss. 102 and 103.

In this case the respondent brought an action for defamation against the appellants as he took exception to two sentences in an open letter published in the *Sarawak International Times* and *Sarawak Siang Pao*, which alleged that he kept concubines. The learned trial judge held that the words complained of were defamatory of the respondent. The appellants' main defences were justification and fair comment. At the trial the appellants called three witnesses to prove these defences; whilst the respondent did not lead any evidence in rebuttal at all. The learned trial judge after considering the evidence before him held that the appellants had failed to establish either or both of these defences and he gave judgment for the respondent. The appellants appealed. On appeal it was contended that the evidence adduced by the appellants had shifted the onus of proof onto the respondent, and as the respondent had not given evidence at all on the question of justification and fair comment, the appellants had fully discharged their burden of proving these two defences and therefore were entitled to judgment.

Held: (1) as the appellants in this case relied on justification and fair comment the burden of proving these defences rested entirely upon them;

(2) having regard to the evidence which was accepted by the learned judge and the principles of law which operate in favour of the respondent, the onus of proof had not shifted to the respondent;

(3) the onus was still on the appellants to prove the truth of their imputations and as they had failed to do so, judgment was rightly given for the respondents.

Cases referred to:-

(1) *Nanji & Co.*, v. *Jatashankar Dossa & Ors.*, A.I.R. 1961 S.C. 1474, 1478.

(2) *Raghavamma* v. *Chenchamma* A.I.R. 1964 S.C. 136, 143.

(3) *Indar Singh* v. *Thakar Singh* (1921) 2 I.L.R. Lah. 207, 216.

(4) *Mohabbat Ali Khan* v. *Mohamed Ibrahim Khan* (1929) 56 I.A. 201, 207.

(5) *Belt* v. *Lawes* (1882) 51 L.J. Q.B. 359, 361.

(6) *Peters* v. *Bradlaugh* (1888) 4 T.L.R. 467, 472.

(7) *Beit* v. *Markham* (1901) 18 T.L.R. 143, 146.

FEDERAL COURT.

Humphrey Ball (*P. Tan* with him) for the appellants.

Matthew Chan for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): As far as can be gleaned from the evidence given at the trial, the factual background of this case began with the arrest and detention of the 6th appellant Chan Siaw Hee and two other persons, Lim Kim Seng and Teng Chew Seng. All three were members of the Sarawak United People's Party (SUPP). On November 1, 1969 all three were released. On the same day a press conference arranged for the 6th appellant by the Information Department was held at Radio Malaysia Sarawak Building, and on the following day (November 2, 1969) the *Sarawak Vanguard*,